

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CHRISTOPHER DANIEL JONES,

Petitioner,

v.

Case No. 09-CV-741

MIKE THURMER, Warden, Waupun
Correctional Institution,

Respondent.

RECOMMENDATION TO UNITED STATES DISTRICT JUDGE

Petitioner Christopher Daniel Jones, who is currently incarcerated at Waupun Correctional Institution, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Rule 4 of the Rules Governing § 2254 Proceedings requires the district court to dismiss a petition summarily where "it plainly appears from the face of the petition . . . that the petitioner is not entitled to relief." See Rule 4, Rules Governing § 2254 Proceedings. He also filed a motion for leave to proceed in forma pauperis (Docket # 4) and a motion to amend the writ of habeas corpus. (Docket # 5).

The petitioner asserts that his liberty is being restrained in violation of the 5th and 14th Amendments. Specifically, the petitioner asserts that as a result of a disciplinary hearing, he is not eligible to participate in the earned release program and was denied placement in minimum custody. By filing his petition, he seeks an order from the court "releas[ing] [him] from the restraints placed upon [his] liberty by ordering the D.O.C. to place [him] back at a low

institutional adjustment so that [he] can be suitable for minimum custody and . . . place [him] in the next available Earned Release Program.” (Petition at 4).

A petitioner cannot use § 2254 to challenge a disciplinary sanction which does not affect the duration of his confinement. Sylvester v. Hanks, 140 F.3d 713, 714 (7th Cir. 1998). In this case, the petitioner does not assert the disciplinary sanction affects the duration of his confinement, i.e., that he lost good time. Moreover, the petitioner does not seek immediate release from custody. Thus, the petition does not relate to the fact or duration of the petitioner’s confinement and, therefore, relief is not available under § 2254. See Bunn v. Conley, 309 F.3d 1002, 1006 (7th Cir. 2002).

Accordingly, this court will recommend that the petition for a writ of habeas corpus be dismissed as it does not state a claim under § 2254. The grounds stated in the petitioner’s motion to amend the writ of habeas corpus do not change the court’s analysis. Nevertheless, the court is not making a decision on the ultimate merits of his case and the petitioner is free to refile his case under the appropriate legal label. See Glaus v. Anderson, 408 F.3d 382, 388 (7th Cir. 2005). If the petitioner chooses to refile his claim under 42 U.S.C. § 1983, he will be subject to the Prisoner Litigation Reform Act, with its rules and consequences. Id. at 390. Given the court’s recommendation, the petitioner’s motion for leave to proceed in forma pauperis need not be addressed.

CONCLUSION

NOW, THEREFORE, IT IS HEREBY RECOMMENDED that the United States district judge enter an order dismissing the plaintiff's petition for a writ of habeas corpus.

IT IS FURTHER ORDERED that a copy of this order be and hereby is mailed to Gregory M. Weber, Assistant Attorney General, Wisconsin Department of Justice, Office of Attorney General, P. O. Box 7857, Madison, Wisconsin 53701 and to the warden of the institution where the petitioner is incarcerated.

Your attention is directed to 28 U.S.C. § 636(b)(1)(B) and (C) and General Local Rule 72.3 (E.D. Wis.), whereby written objections to any recommendation herein or part thereof may be filed within ten days of service of this recommendation. Objections are to be filed in accordance with the Eastern District of Wisconsin's electronic case filing procedures. Courtesy paper copies of any objections shall be sent directly to the chambers of the district judge assigned to the case. Failure to file a timely objection with the district court shall result in a waiver of your right to appeal.

Dated at Milwaukee, Wisconsin this 2nd day of September, 2009.

BY THE COURT:

s/ Patricia J. Gorence
PATRICIA J. GORENCE
United States Magistrate Judge